No. 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of A. F. YOST,
Plaintiffs,

vs.

L. E. DIXON COMPANY, *et al.*,
Defendants.

L. E. DIXON COMPANY, a corporation,
Cross-Complainant,

vs.

VAN HARRIS, an individual doing business as HARRIS & SONS, *et al.*,
Cross-Defendants.

UNITED STATES, to the Use of PARAMOUNT TRUCK RENTAL, INC.,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *et al.*,
Defendants.

Reply Brief of Appellees, Fidelity and Deposit Company of Maryland and L. E. Dixon Company.

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from the denial of attorneys' fees in an action brought under the Miller Act, 49 Stat. 794 (1935), 40 U.S.C. §270b (1952), as amended 73 Stat. 279 (1959), and this court's jurisdiction on appeal rests upon 65 Stat. 726, 28 U.S.C. §1291 (1951).

II.
ARGUMENT.

A. An Award of Attorneys' Fees Is Neither Provided for nor Required by the Miller Act Itself.

Paramount Truck Rental, Inc., the appellant herein, argues that the Miller Act itself dictates an award of attorneys' fees to a successful use plaintiff suing on a Miller Act bond. Appellant did not see fit to raise this argument in its brief before the District Court below [Clk. Tr. pp. 86-89], and the argument is raised on this appeal despite the fact that the Miller Act itself does not in any way deal with or even mention the question of attorneys' fees. And yet, "it is an elementary principal of law . . . that a reasonable attorney's fee cannot be allowed to a successful litigant unless it is provided for by contract, or by a controlling statute." *United States v. Hoffman Construction Co.,* 163 F. Supp. 296, 297 (E.D. Wash. S.D. 1958). How then, can appellant argue that the Miller Act itself dictates an award of attorneys' fees?

Appellant's entire argument on this point is based upon two cases, *United States v. Breeden,* 110 F. Supp. 713 (D.C. Alaska 1953) and *United States v. Fidelity and Deposit Co. of Maryland,* 144 F. Supp. 322 (W.D. La. 1956). Appellant contends that these cases "held" that the "Miller Act itself provides for and requires the award of attorneys' fees in behalf of a prevailing use plaintiff." (Appellant's Op. Br. p. 3.) Even the most cursory reading of these cases, however, reveals that they did not so hold, despite the broad language quoted by appellant.

The first point to be noted about *United States v. Breeden, supra,* 110 F. Supp. 713, is that Alaska, at the time of the *Breeden* decision, had not yet attained statehood, and was governed by acts of the United States Congress. Furthermore, the District Court for the District of Alaska, a territorial court created by Congress, had jurisdiction over both Federal and local controversies. The Alaska law at that time, as enacted by the United States Congress, provided in part as follows:

> "§55-11-51. Compensation of attorneys. The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, *which allowances are termed costs.*" 55-11-51 Alaska Compiled Laws, 1949 (Emphasis added).
>
> "§55-11-52. Costs allowed of course to plaintiff. Costs are allowed, of course, to the plaintiff *upon a judgment in the district court* in his favor in the following cases:
>
> . . .
>
> "Fifth. In an action not hereinbefore specified, for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more." 55-11-52 Alaska Compiled Laws, 1949 (Emphasis Added).

Thus, the District Court was faced, in the *Breeden* case, with a statute passed by the United States Congress declaring that reasonable attorneys' fees could be recovered as "costs", and another statute passed by the

United States Congress declaring, without reservation, that costs are allowed, of course, "upon a judgment in the district court," meaning the District Court for the District of Alaska. Faced with these statutes, the court could hardly have done otherwise than to allow the use plaintiff his attorneys' fees. That the Alaska statutes were, in fact, the basis of the court's decision is shown by the following statement by the court:

> "In the Montana case cited above [*United States v. Seaboard Surety Co.*, 26 F. Supp. 681 (D. Mont. 1938)], the decision [disallowing attorneys' fees] rested upon the local statutes of Montana which apparently failed to make any provision for allowance of the attorneys' fees for the prevailing parties in suits brought in the State.
>
> "In Alaska, not only does the local statute quoted above make such provision, but it is itself an act of the Congress of the United States, although of only local application, and there is nothing in the act which indicates that its provisions would not be applicable to suits brought on a contractor's bond such as we have before us here".
>
> *United States v. Breeden, supra,* 110 F. Supp. at 715.

Nor does the *Fidelity and Deposit Co.* case, *supra*, 144 F. Supp. 322, stand for the broad proposition that the Miller Act dictates an award of attorneys' fees. In that case, in fact, the question of the recovery of attorneys' fees incurred in a Miller Act suit was not even raised. Prior to the Miller Act suit in question in that case, the defendant had filed suit in the state court seeking an injunction restraining the use plaintiff from

removing his equipment from the job site. The use plaintiff subsequently succeeded in getting the state court injunction dissolved, incurring attorneys' fees in the sum of $1,750.00. Thereafter, in the Miller Act suit, the use plaintiff sought, and was awarded, reimbursement for the attorneys' fees *incurred in the state court action.* In reaching this decision, the court cited *Illinois Security Co. v. John Davis Co.,* 244 U.S. 376, 61 L. Ed. 1206 (1917), and noted: "Court allowed expenses of getting equipment to and from job site." *United States v. Fidelity and Deposit Co. of Maryland, supra,* 144 F. Supp. at 329. It is clear, therefore, that the award of attorneys' fees in that case was not based upon the court's belief that the Miller Act dictates the recovery of attorneys' fees in a Miller Act suit, since the fees awarded were not incurred in prosecuting the Miller Act suit; rather, the award was made merely to compensate the use plaintiff for all expenses in getting his equipment from the job site, which happened to include, in that case, attorneys' fees incurred in the state court action.

In summary, then, appellant has attempted to construct an argument overthrowing the well established rule against an award of attorneys' fees in the absence of a contractual or statutory provision specifically providing for their recovery, and in support of this argument has cited and relied exclusively upon two cases, neither of which, in fact, stands for the proposition attributed to it. Appellees respectfully submit that appellant has utterly failed to show any rational basis for the proposition that the Miller Act itself dictates an award of attorneys' fees to a use plaintiff.

B. Appellant Is Not Entitled to Attorneys' Fees Under State Law.

Appellant makes the assumption that if the Miller Act itself does not require an award for attorneys' fees, then resort must be made to State law to determine the propriety of such an award. Although some courts have so held, appellees respectfully submit that the better reasoned rule is that set down in *United States v. Hoffman Construction Co., supra,* 163 F. Supp. 296, 297, where the court stated:

> "[T]he Miller Act is silent as to whether such allowances may be made. It is an elementary principal of law, however, that a reasonable attorney's fee cannot be allowed to a successful litigant unless it is provided for by contract, or by a controlling statute. I do not believe that the provisions of the statutes of the State of Washington respecting allowance of a reasonable attorney's fee in actions to foreclose liens for labor and materials can be carried over and incorporated into the Miller Act. The Miller Act is a different, separate statute which provides for a particular and peculiar type of action."

Assuming, however, but in no way conceding, that state law should be applied in deciding the propriety of an award of attorneys' fees in a Miller Act suit, California law does not, either expressly or by public policy implication, allow such an award. The overriding statement of California policy in this regard is found in California Code of Civil Procedure, Section 1021, which provides in part:

> "*Except as* attorney's fees are *specifically provided for by statute,* the measure and mode of

compensation of attorneys and counselors at law is left to the agreement . . . of the parties . . ." (Emphasis added).

Appellant, ignoring this crystal clear statement of California policy, contends that California policy is more clearly discernible by implication from Sections 4200, 4204 and 4207 of the California Government Code, which are nothing more than a narrow, statutory exception to the primary policy declared by Section 1021 of the Code of Civil Procedure.

It is strange that appellant would have devoted so much time and energy in attempting to convince this court that Government Code Sections 4200, 4204 and 4207 dictate an award of attorneys' fees in this case, inasmuch as a California appellate court has recently rendered the question academic in *B. C. Richter Contracting Co. v. Continental Casualty Co.*, 230 A.C.A. 540, 41 Cal. Rptr. 98 (1964). There, the suit was brought on a Capehart Act bond, and the plaintiff made exactly the same "public policy" argument that appellant herein has made. Judge Friedman, speaking for a unanimous court, responded as follows:

"In actions at law in California, attorney fees are not recoverable in the absence of a contractual agreement or special statute. (*Reid v. Valley Restaurants, Inc.*, 48 Cal.2d 606, 610, 311 P.2d 473.) Since there was no contract for a fee, the award made by the trial court must find some statutory foundation. Government Code Section 4207, authorizing fee awards in suits on contractors' bonds, applies only to public works of the State of California and of California political subdivisions and agencies. (Gov. Code §4200.) *Section 4207 has*

no application to private construction projects or *to projects of the United States.* It formulates a rule for a restricted class of projects, those undertaken by the State and its instrumentalities. The appeal briefs debate whether a Capehart Act project is "public' or 'private.' The debate is pointless, since—whatever it is—*the project is not one to which the California statute applies.* That statute is a false quantity, an irrelevant happenstance, in this lawsuit. California does not authorize award of an attorney fee against Hayes-Cal, the principal obligor; thus, there is no liability which may be passed on to the surety. *The trial court erred in awarding attorney fees.*

"At least one Miller Act decision has pursued state law to the point of awarding an attorney fee on the strength of a state statute like that of California, authorizing fee awards in suretyship actions on state public works contracts. (*United States for Use and Benefit of Western Steel Co. v. Reliance Ins. Co. of Philadelphia, Pa.,* 227 F. Supp. 939 (D.C. Mont., 1964).) [Relied heavily upon by appellant herein.] Such an award, we think, misses the point that the surety's liability is an extension of its principal's. The decision runs counter to the current of federal decisional law, which permits the award only where state law would have made the contractor himself liable for a fee." 230 A.C.A. at 555, 41 Cal. Rptr. at 108 (Emphasis added).

A clearer exposition of California policy by a California court could not be hoped for than is contained in this rather long but extremely comprehensive quota-

tion. It meets head-on the very arguments put forth by appellant herein, even to the point of disapproving of and rejecting the reasoning of the court in *United States v. Reliance Ins. Co. of Philadelphia, Pa., supra,* 227 F. Supp. 939, the very case upon which appellant relies most heavily. That the *Richter* case was a Capehart rather than a Miller Act suit is of no relevant concern, since it is a well established rule that Capehart and Miller Act decisions are, for most purposes, interchangeable.

> "We find the protection accorded by the Miller and Capehart Acts is in many instances identical. Both are an attempt to protect the laborers and materialmen on a government project, where they have no rights under the state lien laws. To this extent the two acts should be interpreted together, and this court will do so except in those cases where the Miller Act, or the cases decided under it, are contradicted by the Capehart Act, the cases decided under it, or the terms of the bond." *National State Bank of Newark v. Terminal Const. Corp.,* 217 F. Supp. 341, 351 (D.N.J. 1963). See also, *D & L Construction Co. v. Triangle Elec. Supply Co.,* 332 F.2d 1009 (8th Cir., 1964); *United States v. Travelers Ind. Co.,* 215 F. Supp. 455 (W.D. Mo. 1963); *B. C. Richter Contracting Co. v. Continental Casualty Co., supra,* 41 Cal.Rptr. 98, 103.

It has been directly held by the United States Supreme Court that where, as here in the *Richter* case, *supra,* an intermediate state appellate court has announced the state law on a given issue, the Federal courts are bound by that decision unless there is con-

vincing evidence that the law of the State is otherwise. *Six Companies of California v. Joint Highway District No. 13,* 311 U.S. 180, 85 L. Ed. 114 (1940). Appellees respectfully submit, therefore, that even assuming, *arguendo,* that state law does control the award of attorneys' fees under the Miller Act, the *Richter* decision, *supra,* conclusively prohibits such an award under California law.

III.

Conclusion.

The court below did not err in denying appellant an award for attorneys' fees, since neither the Miller Act itself nor the law of California provides for such an award.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

James W. Baldwin